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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

ROBERT W. HUISKAMP

Petitioner,

vs.

NEW YORK CONNECTING RAILROAD COMPANY and HORIZON TRUST COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI

FROM A DECISION OF THE

THIRD CIRCUIT COURT OF APPEALS

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54 pp

QUESTIONS PRESENTED

Res judicata - effect of bankruptcy court order on strangers to the proceedings.

In general, the case presents the question of the power of a bankruptcy court order to bind persons and interests other than the bankrupt and its assets. In particular, can an order of a bankruptcy court authorizing the bankrupt to make a tender offer to bondholders of a non-bankrupt subsidiary affect the rights between the subsidiary and its bondholders? Specifically, can that order change the status of the bondholders as judgment creditors of the subsidiary, and become res judicata as to that issue, without the presence or participation in the bankruptcy proceedings by the bondholders?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii, iv
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING WRIT	7
1. Res Judicata Cannot Be Applied Unless the Same Claim Was Previously Fully and Finally Litigated.	9
2. Res Judicata is a Doctrine to Permit Fairness, Not to Defeat Claims.	17
CONCLUSION	20
PROOF OF SERVICE	22

TABLE OF AUTHORITIES

	Page
Allen v. McCurry, 449 U.S. 90; 66 L.Ed2d 268 (1980)	19
Arenas v. United States, 197 F.2d 418 (9th Cir. 1952)	11
Ash Sheep Co. v. United States, 252 U.S. 159, 170; 64 L.Ed. 507 (1919)	12
Brown v. Felsen, 442 U.S. 127; 60 L.Ed.2d 769 (1979)	19
Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 597; 92 L.Ed. 898 (1948)	13
Cromwell v. County of Sac, 94 U.S. 351, 356; 24 L.Ed. 195 (1876)	10
Federated Dept. Stores v. Moite, 452 U.S. 394; 69 L.Ed.2d 103 (1980)	19
Goldsmith v. M. Jackman & Sons, Inc., 327 F.2d 184 (10th Cir. 1964)	10
Gratiot County State Bank v. Johnson, 249 U.S. 246, 248; 63 L.Ed. 587 (1919)	12,14
Hansberry v. Lee, 311 U.S. 32, 40; 85 L.Ed. 22 (1940)	18
Litchfield v. Goodnow, 123 U.S. 549, 550-551; 31 L.Ed. 199 (1887)	14
Mason v. Williams, 213 U.S. 453, 455; 53 L.Ed. 869 (1909)	12

Montana v. United States,
440 U.S. 147, 164 fn. 11; 59
L.Ed.2d 210 (1978) 15,19

Pennoyer v. Neff,
95 U.S. 714; 24 L.Ed. 565 (1877) 18

Postal Telegraph Cable Co. v. Newport,
247 U.S. 464; 62 L.Ed. 1215 (1917) 18

Robinson v. First National City Bank,
482 F.Supp. 92 (S.D.N.Y. 1979) 16

Smith v. McCool,
83 U.S. 560, 561; 21 L.Ed. 324 (1872) 10

Southwest Airlines Co. v. Texas International Airlines, Inc.,
546 F.2d 84 (5th Cir.) cert. den.
434 U.S. 832 (1977) 15

United States v. International Building Co.,
345 U.S. 502, 504-505; 97 L.Ed.
1182 (1952) 12

United States v. Silliman,
167 F.2d 607, 615 (3rd Cir. 1948)
cert. den. 335 U.S. 825 11

United States Codes

28 U.S.C. §1254 2

28 U.S.C. §1332 6

PETITION FOR WRIT OF CERTIORARI

To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Robert W. Huiskamp, the petitioner, prays that a writ of certiorari issue to review the judgment of the Third Circuit Court of Appeals entered in this case on November 10, 1986.

OPINIONS BELOW

On March 4, 1986 the United States District Court for the Eastern District of Pennsylvania entered its unreported opinion. A copy of that opinion is attached in Appendix A, pages 1 to 11. That judgment was timely appealed to the Third Circuit Court of Appeals. On November 10, 1986, the Third Circuit Court of Appeals entered its unreported opinion affirming the District Court. A copy of that opinion is attached in Appendix A , pages 12 to 16. A timely petition for rehear-

ing was denied on December 9, 1986. A copy of that denial is attached in Appendix A, page 17.

JURISDICTION

The judgment of the Third Circuit Court of Appeals was entered on November 10, 1986. A timely petition for rehearing was denied on December 9, 1986. (Appendix A, page 17). The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254.

QUESTIONS PRESENTED

Can an order of a bankruptcy court authorizing the bankrupt to make a tender offer to bondholders of a non-bankrupt subsidiary affect the rights between the subsidiary and its bondholders? In particular, can that order change the status of the bondholders as judgment creditors of the subsidiary, and become res judicata as to that issue, without the presence or participation in the bankruptcy proceedings by the bondholders?

STATEMENT OF THE CASE

The petitioner was a bondholder of New York Connecting Railroad Company ("NYCRR"), a wholly owned subsidiary of Penn Central Railroad Company ("Penn Central"). NYCRR owned a bridge linking southeastern rail routes with the Sunnyside yard in the Bronx. NYCRR had issued bonds to finance the bridge, and the bondholders held a first mortgage on the bridge. A trustee was named to act for the bondholders to protect their rights under the first mortgage (the "Trustee").

The bridge (and connecting track) was leased from NYCRR by Penn Central. In 1970, Penn Central filed a petition in bankruptcy and discontinued lease payments to NYCRR. NYCRR was thereafter unable to make the bond coupon payments, and defaulted. The Trustee took no action until 1976, but then obtained a consent judgment in the United States District Court for the Southern District of New

York against NYCRR on behalf of the bondholders for the outstanding bond indebtedness.

The rail assets of NYCRR were conveyed to Conrail in 1976 in return for a right to receive a pro rata part of the award in the Valuation Case, so the judgment could not be enforced until the proceeds from the Valuation Case were received by NYCRR.

In 1979, while the Valuation Case was still proceeding, Penn Central proposed a tender offer for the NYCRR bonds. As a part of Penn Central's petition, an agreement was entered between Penn Central, NYCRR and the Trustee, which contained the following language:

> "8. Treatment of bonds not acquired by Penn Central. In the event that Penn Central acquires some but not all of the New York Connecting bonds pursuant to the tender offer, the amounts which may be due holders of New York Connecting bonds that are not so acquired shall be satisfied,

> as provided in the First Mortgage and subject to the provisions of Paragraph 6 of this agreement, out of the proceeds of the recovery of the New York Connecting in the Valuaton Case and any other assets of New York Connecting available for that purpose. To the extent that such amounts are not so satisfied in full, they will be entitled to be satisfied as unsecured claims included within Class M of the Plan by means of the issuance of common stock and certificates of beneficial interest."

The Penn Central bankruptcy court approved the petition and made Order No. 4003 which authorized Penn Central to make the tender offer. That order approved the agreement between Penn Central, NYCRR and the Trustee. Penn Central made the tender offer and acquired most of the NYCRR bonds. The petitioner did not tender his bonds, and remained an NYCRR bondholder.

In 1980, the Valuation Case was settled, and NYCRR received the principal amount of the bonds plus 8% interest from the date of the transfer to Conrail. NYCRR then offered the Trustee the principal amount of the bonds plus the amount of the coupons (2-7/8%). After

initially refusing to accept that amount, and demanding the principal plus 8%, the Trustee later agreed to accept the principal amount plus 2-7/8% interest, and tendered that amount to the NYCRR bondholders.

The petitioner refused to accept that amount, contending that he was entitled to the amount NYCRR received from the Valuation Case. The Trustee represented that the bond indenture limited the petitioner to the coupon rate. The petitioner contended he was a judgment creditor and should receive the rate of interest on New York judgments. The difference was approximately $60,000. When the Trustee and NYCRR refused to pay the judgment amount, the petitioner brought an action in the United States District Court for the Eastern District of Pennsylvania, basing jurisdiction on diversity of citzenship between the parties pursuant to 28 U.S.C. §1332.

The District Court granted a motion for

summary judgment on the ground of res judicata, holding that the bankruptcy order approving the Penn Central tender offer constituted a final determination that the bondholders were entitled to the coupon amount. The court reasoned that the order approved the agreement between Penn Central, NYCRR and the Trustee which contained the language of paragraph 8, and under that language the bondholders were only entitled to receive the 2-7/8% coupon rate, not the judgment rate of interest.

The Third Circuit Court of Appeals affirmed the decision, holding that the Penn Central bankruptcy court order was res judicata on the rights of the bondholders against NYCRR, thereby terminating the bondholder's judgment creditor status and rights, and returning them to bondholder status.

REASONS FOR GRANTING WRIT

The decision that a bankruptcy order may affect the rights between non-participating

bondholders and a non-bankrupt subsidiary transports the doctrine of res judicata far beyond the limits which the Supreme Court has imposed. The Supreme Court has consistently held that in order to apply the doctrine of res judicata, certain fundamental elements must be present, including:

(A) The party to be bound must be before the court in the first tribunal, either in person or by an authorized representative who had the power and motivation to, and did, represent the interests of the party to be bound; and

(B) The decision made in the first tribunal must be a final judgment in a case where the object was to decide the issues sought to be determined against the party to be bound, and which did decide those issues adversely to the party to be bound.

In the present case, these elements are not present. The Penn Central bankruptcy court was

considering a petition by Penn Central to authorize a tender offer by Penn Central to the NYCRR bondholders. The jurisdiction of the bankruptcy court was solely over Penn Central and its assets. NYCRR was not in bankruptcy and was not before the court. NYCRR's bondholders clearly were non-participants in the Penn Central bankruptcy proceedings. The order approved the tender offer by Penn Central, but did not consider or decide that the NYCRR bondholders were required to change their judgment creditor status, or lose their judgment rights against NYCRR.

1. Res Judicata Cannot Be Applied Unless the Same Claim Was Previously Fully and Finally Litigated.

In concluding that res judicata precludes the petitioner from asserting his rights as a judgment creditor, the opinions below held that the Penn Central bankruptcy order constituted a final judgment as to the rights be-

tween NYCRR and the bondholders, even though neither was before the court, because the order approved the agreement between Penn Central, NYCRR and the Trustee, which included the language in paragraph 8. In applying the doctrine of res judicata to the present facts, the opinions below have come into conflict with well-established Supreme Court rules and decisions.

First, res judicata operates only in cases where the court has jurisdiction of the parties and the subject matter. Cromwell v. County of Sac, 94 U.S. 352, 356; 24 L.Ed. 195 (1876); Smith v. McCool, 83 U.S. 560, 561; 21 L.Ed. 324 (1872). The proper jurisdiction of a bankruptcy court is limited to determinations concerning the bankrupt and the bankrupt's property consequently the res judicata effect of those determinations applies only to the bankrupt and its assets. Goldsmith v. M. Jackman &

Sons, Inc., 327 F.2d 184 (10th Cir. 1964).

In the present case, however, the opinions below have given res judicata effect to a bankruptcy court order as between two parties over whom the bankruptcy court had no jurisdiction, either personally or as to the subject matter. The Penn Central bankruptcy court had jurisdiction over Penn Central and its assets only. Even assuming that the bankruptcy court order ruled on the judgment creditor status of the bondholders, that would not have res judicata effect. When a court incidentally determines a matter it would not have had jurisdiction to decide in the first instance, that incidental determination is not accorded res judicata effect. Arenas v. United States, 197 F.2d 418 (9th Cir. 1952); United States v. Silliman, 167 F.2d 607, 615 (3rd Cir. 1948) cert. den. 335 U.S. 825.

Second, in order for res judicata to bar a subsequent suit, the same issues must have been

tendered for decision and decided by the court. United States v. International Building Co., 345 U.S. 502, 504-505; 97 L.Ed. 1182 (1952). Where the prior action was not intended to determine the question at issue in the subsequent action, res judicata will not bar the subsequent action. Ash Sheep Co. v. United States, 252 U.S. 159, 170; 64 L.Ed. 507 (1919) ["A judgment is not conclusive of any question which, from the nature of the case or the form of action, could not have been adjudicated in the case in which it was rendered"]. In general, the object of both actions must be the same to justify the application of res judicata, and an adjudication in bankruptcy is limited to determining the rights in the bankrupt's property, so it is not res judicata as to the facts or subsidiary questions leading to that determination. Gratiot County State Bank v. Johnson, 249 U.S. 246, 248; 63 L.Ed. 587 (1919); Mason v. Williams, 213 U.S. 453, 455;

53 L.Ed. 199 (1909).

The purpose of the bankruptcy petition was to authorize Penn Central's tender offer. There was no reason for the bankruptcy court to determine or change the judgment creditor status of the NYCRR bondholders. The issue in the second suit (whether the bondholders are judgment creditors) was never discussed in the bankruptcy court order. The only possible mention of such an issue is the phrase "as provided in the First Mortgage" in paragraph 8 in the agreement between Penn Central, NYCRR and the Trustee, which the bankruptcy court approved for Penn Central. That could hardly put in issue the status of the bondholders as judgment creditors of NYCRR.

Third, the petitioner was clearly not present, therefore he would be bound only if the Trustee was a party and entitled to represent him in that proceeding. Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 597;

92 L.Ed. 195 (1948). Further, only if the Trustee asserted the same interest as the petitioner, with the same motivation to do so, could the petitioner be bound. Litchfield v. Goodnow, 123 U.S. 549, 550-551; 31 L.Ed. 193 (1887).

The trust indenture specifically precluded the Trustee from compromising the rights of the bondholders in a bankruptcy proceeding (Article 7, Section 15), and unless the Trustee was authorized to represent the petitioner, a decision against the Trustee could not bind the petitioner. Gratiot County State Bank v. Johnson, supra at 248; see Restatement of Judgments 2d, §42(1)(b).

Finally, the opinions below appear to assume and accept that the Trustee executed the agreement to protect the rights of the bondholders who accepted the tender offer, but in doing so agreed that non-tendering bondholders lost their judgment creditor rights. If that

is the effect of the Trustee's acts, there was a conflict in the representation of both groups by the Trustee and a failure of consideration as to the non-tendering bondholders. Where the prior representation is inadequate as a result of such conflict, res judicata effect to the prior proceeding will be denied. Southwest Airlines Co. v. Texas International Airlines, Inc., 546 F.2d 84 (5th Cir.) cert. den. 434 U.S. 832 (1977); Restatement of Judgments 2d, §42(1)(d) and (e). In general, where there is doubt about the quality, extensiveness or fairness of procedures followed in the prior litigation, res judicata effect will be denied to that litigation. Montana v. United States, 440 U.S. 147, 164 fn. 11; 59 L.Ed.2d 210 (1978).

In a similar situation in the same bankruptcy proceeding, a New York federal district court refused to give res judicata effect to a class action suit when an individual Penn Central shareholder not part of the class

action later brought suit. In Robinson v. First National City Bank, 482 F.Supp 92 (S.D.N.Y. 1979) several Penn Central shareholders filed a class action against banks which had offered misleading information to the shareholders in a restructuring of the railroad. The same shareholders also filed a claim in the bankruptcy proceedings. In 1978, the bankruptcy court approved a final plan of reorganization, which determined and finally resolved the issues raised in the bankruptcy claim. The banks then moved to dismiss the class action lawsuit on res judicata grounds. The court held that as to the named plaintiffs, the reorganization plan determined the class action issues and was res judicata; as to other members of the class, however, the bankruptcy reorganization had no res judicata effect. The court found that the shareholders could be bound in one of two ways: (a) by in rem reorganization jurisdiction or (b) by representa-

tive jurisdiction through the named plaintiffs. The court held that neither basis for jurisdiction was applicable because (a) the claims were not against the debtor's assets, but against the banks which participated in the restructuring and (b) the named parties did not have the right to represent the remaining class members.

The same lack of jurisdiction or right of representation exists in the present case, since the original bankruptcy approval was merely intended to apply to Penn Central and its assets, the petitioner was not present, the Trustee did not have power to appear for the petitioner or compromise his rights, and the present suit involves substantially different claims regarding the petitioner's status as a judgment creditor of NYCRR and claims against the Trustee.

2. Res Judicata is a Doctrine to Permit Fairness, Not to Defeat Claims.

A person is not bound by a judgment in personam in litigation to which he is not a party or served with process. Pennoyer v. Neff, 95 U.S. 714; 24 L.Ed. 565 (1877); Hansberry v. Lee, 311 U.S. 40 (1940). Judicial action enforcing a judgment against the person or property of the absent party is not consistent with Fifth Amendment due process. Postal Telegraph Cable Co. v. Newport, 247 U.S. 464; 62 L.Ed. 1215 (1917). Here, the petitioner was not a party to the bankruptcy proceedings or the agreement by Penn Central, NYCRR and the Trustee.

The doctrine of res judicata bars relitigation of a claim if that claim has been previously litigated before a court of competent jurisdiction. The doctrines of res judicata and collateral estoppel are intended to provide fairness to the litigation process and to stop adjudication of the same matter over and over again. On the other hand, since res judi-

cata is based on a policy of fairness, it should not be applied to prevent a litigant from having his claims heard once. Only those claims which have been previously heard and decided are candidates for res judicata.

The Supreme Court has discussed the policy reasons for the doctrine of res judicata in a number of recent opinions. Federated Dept. Stores v. Moite, 452 U.S. 394; 69 L.Ed.2d 103 (1980); Allen v. McCurry, 449 U.S. 90; 66 L.Ed.2d 268 (1980); Brown v. Felsen 442 U.S 127; 60 L.Ed.2d 769 (1979). In general, the Supreme Court has looked with favor on the doctrine, properly applied. However, in Montana v. United States, 440 U.S. 147; 59 L.Ed. 869 (1979) the court noted the requirement that the application of res judicata necessitates that the party to be bound actually had a "full and fair opportunity to litigate" in the prior proceeding. Montana, supra, at 153.

As a non-participant in the bankruptcy proceedings, the petitioner had no opportunity to protect his rights. Moreover, he had no notice that bankruptcy court approval of the tender offer would affect the judgment creditor rights of the non-tendering bondholders. Now, the opinions below have interpreted the phrase "as provided in the First Mortgage" in the agreement signed by Penn Central, NYCRR and the Trustee as adversely changing the rights of the non-tendering bondholders, and acting as res judicata on the petitioner even though he was not present or aware that his rights were being affected. That is simply too harsh; res judicata is not intended to cut off rights which were not originally fully and finally "litigated" in the first instance.

CONCLUSION

For the foregoing reasons, we respectfully request that the Supreme Court grant this petition for a writ of certiorari to review the

determination that res judicata bars the petitioner's claims.

Dated: March 5, 1987

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APPENDIX

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

ROBERT W. HUISKAMP,	:	CIVIL ACTION
v.	:	
NEW YORK CONNECTING RAILROAD COMPANY and HORIZON TRUST COMPANY	:	NO. 85-1718

MEMORANDUM AND ORDER

FULLAM, J. MARCH 3, 1986

Pursuant to a First Mortgage Indenture dated October 1, 1940, the New York Connecting Railroad Company issued certain "2-7/8% Series B Bonds". The bonds were backed by the guarantee of a predecessor of Penn Central Transportation Company, to which the New York Connecting Railroad Company had leased its rail lines for a long term, at rentals calculated to enable New York Connecting to amortize the bonds and pay dividends.

Plaintiff Robert Huiskamp is a former holder of a substantial number of these bonds

who contends that he did not receive full payment when he redeemed his bonds. The interest rate specified on the face of the bonds was 2-7/8%, and it is agreed that plaintiff received payment in full of the principal amount of the bonds plus accrued interest (and interest on the interest) at 2-7/8%. It is plaintiff's contention that, under the theories discussed below, he was entitled to a higher rate of interest. It was expressly agreed, when plaintiff redeemed his bonds, that the redemption was without prejudice to plaintiff's right to pursue the claims asserted in this litigation.

The parties' respective contentions are best understood after briefly sketching the legal ramifications of railroad leases in bankruptcy proceedings. At a time in our history when rail systems were being developed -- as distinguished from an aggregation of smaller, separate companies whose operations were somewhat Balkanized -- the long-term railroad lease was frequently utilized as the mechan-

ism for financing the necessary construction and achieving the desired consolidation of operations, while avoiding the legal and practical obstacles to railroad mergers.

The bankruptcy of the lessee railroad can be expected to cause the immediate cessation of rental payments -- except in the rare case in which the lessee's trustee is in a position to, and does, assume the lease obligations. By the time of the lessee's bankruptcy, it is usually the case that the lessor is no longer capable of operating a railroad, having been effectively removed from the railroad business for many years. But it is not permissible to terminate rail operations, for various economic and regulatory reasons. Thus, the usual situation, following the bankruptcy of the lessee railroad, is that the bankrupt lessee continues to conduct rail operations, but is deemed to do so for the account of the lessor. Rejection of the lease gives rise to claims against the estate of the bankrupt lessee. Conversely, if rail opera-

tions over the leased lines result in further losses, the bankrupt lessee has claims against the lessor to that extent. Of course, determining the amount of profit or loss generated by the conduct of rail operations over a particular portion of a rail system is a very difficult, expensive and time-consuming task, capable of spawning protracted litigation.

When the lease covers virtually all of the property of the lessor, the bankruptcy of the lessee may trigger the bankruptcy of the lessor. In the case of Penn Central Transportation Company, some 14 lessors entered bankruptcy, under the aegis of the same court handling the Penn Central bankruptcy. Several other lessors, including New York Connecting, did not need to seek the protection of the bankruptcy court.

With respect to the bankruptcy lessors, it was possible to devise reorganization plans in conjunction with the reorganization of Penn Central itself, given the "cram-down"

provisions of § 77 of the Bankruptcy Act, as it then existed. The reorganization court in each instance undoubtedly had jurisdiction over the property of the bankrupt lessor. With respect to the non-bankrupt lessors such as New York Connecting, however, there was great uncertainty as to the extent of the jurisdiction of the Penn Central bankruptcy court. It was clear that the Penn Central reorganization court had jurisdiction over the leased lines, and could prevent interference with rail operations over these lines, and could suspend enforcement of the lease provisions against Penn Central. But it was at least highly doubtful that the Penn Central Reorganization Plan could achieve a final adjustment of the claims of New York Connecting's bondholders without their consent.

An already complex legal situation was further complicated when, pursuant to the Regional Rail Reorganization Act of 1973, the bankrupt railroads, including Penn Central, were required to convey their rail properties

to ConRail on April 1, 1976. This conveyance included substantially all of the assets covered by the New York Connecting lease. The amount of the consideration to be paid by ConRail to the bankrupt railroads remained to be determined later, through valuation proceedings in the Special Court (the "Valuation Case"). Payment would be in the form of certificates of value ("CV's") which would bear interest at the rate of 8% per annum from and after April 1, 1976.

The 1978 Reorganization Plan for the Penn Central Transportation Company provided a "10 triple 30" form of distribution to bondholders -- 10% cash, 30% in each of three types of securities. The debt securities, if not sooner paid, would eventually be paid from the proceeds of the Valuation Case. The reorganization plans for the bankrupt leased lines included comparable provisions.

In order to achieve an acceptable solution in the case of non-bankrupt lessors such as New York Connecting, there were extensive

discussions and negotiations between Penn Central representatives and the representatives of their bondholders. As of the date of the conveyance of the properties to ConRail, the claims of New York Connecting's bondholders, under the terms of the mortgage, aggregated approximately $21.8 million. The assets of New York Connecting which had been conveyed to ConRail had a book value of about $16.4 million (but had been valued by U.S. Railway Association at only $6.2 million). New York Connecting had about $100,000 in cash and other assets. Penn Central's running account of transactions between New York Connecting and Penn Central showed a balance due New York Connecting of about $3.7 million; an engineering study of rail operations over the New York Connecting lines showed losses at the rate of about $1.5 million per year for each of the two years studied. There were arguable bases for contesting the accuracy of all of these figures.

In June 1979, a settlement agreement was reached between Penn Central, on the one hand,

and New York Connecting and the indenture trustee for its bondholders, on the other. The settlement agreement was submitted to this court for approval. After a duly noticed hearing -- notice was sent to each bondholder -- I approved the compromise settlement on October 1, 1979 (Order No. 4003).

The settlement agreement contemplated that Penn Central would carry out a tender offer for the acquisition of the outstanding bonds of New York Connecting, offering essentially the same "10-triple-30" package which the reorganization plans of Penn Central and the secondary debtors gave to other bondholders. After approval of the settlement agreement, Penn Central carried out the tender offer and acquired most of the outstanding bonds. Plaintiff did not tender his bonds.

Paragraph 8 of the settlement agreement provides as follows:

"8. Treatment of bonds not acquired by Penn Central. In the

> event that Penn Central acquires some but not all of the New York Connecting bonds pursuant to the tender offer, the amounts which may be due holders of New York Connecting bonds that are not so acquired shall be satisfied, as provided in the First Mortgage and subject to the provisions of Paragraph 6 of this agreement, out of the proceeds of the recovery of the New York Connecting in the Valuation Case and any other assets of New York Connecting available for that purpose. To the extent that such amounts are not so satisfied in full, they will be entitled to be satisfied as unsecured claims included within Class M of the Plan (i.e., Penn Central's Reorganization Plan) by means of the issuance of common stock and certificates of beneficial interest."

Paragraph 7 of the same agreement provided for the mutual cancellation and discharge of all claims among New York Connecting, the indenture trustee, and Penn Central, under the guarantee agreement in which Penn Central had guaranteed the payment of the bonds.

In due course, the proceeds from the Valuation Case recovery became available to New York Connecting. Plaintiff was paid the face amount of his bonds, together with accrued interest at the rate of 2-7/8%. The payment included interest at the same rate on the interest accruing after default (i.e., after 1970). As noted above, plaintiff contends that such payment did not full satisfy his claims, and he reserved the right to proceed with this litigation.

Plaintiff's basic contention is relatively straightforward. The interest rate on the face of the bonds is 2-7/8% per annum but the law of New York provides for a much higher rate of interest on judgments. When default in interest payments occurred in 1970, and a fortiori, when there was default in the payment of principal in 1975, the indenture trustee should have obtained a judgment against New York Connecting for the entire amount then due. That judgment would have borne interest at the statutory rate (7-1/2%), in 1970).

Penn Central, as the successor to New York Connecting[1] is liable for the amount of interest remaining unpaid. And the Horizon Trust Company, as successor to the Bank of New York, which was the indenture trustee of the New York Connecting Bond issue, is liable for breach of its fiduciary duties in failing to protect the interests of the bondholders by obtaining that result.

The correctness of plaintiff's legal position is, it is argued, further supported by equitable ocnsideration: the proceeds of the Valudation Case included interest at the rate of 8% from and after April 1, 1976.

The basic difficulty with plaintiff's

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1. Penn Central owned all of the common stock of New York Connecting at all relevant times. After the tender offer for the bonds, New York Connecting was merged into the reorganized Penn Central.

arguments, in my view, is that they come much too late in the day. The indenture trustee did file suit, in a New York court, when the principal default occurred in 1975. The litigants then negotiated a consent decree, under which the entry of judgment for the balance then due on the bonds was conditioned upon the agreement that leave of this court would be required before any attempt was made to enforce the judgment. There can be no contention that it was improper for the indenture trustee to agree to the terms of this consent judgment. Not only were all of the assets which might have been looked to for collection of the judgment within the control of the Penn Central bankruptcy proceeding and about to be conveyed to ConRail under the aegis of the Special Court, but any attempt to enforce the judgment would undoubtedly have precipitated the bankruptcy of New York Connecting (i.e., it would have joined the other secondary debtors). The probable fate of a claim for statutory interest, in that event, would surely

have been problematical at best.

Thus, plaintiff's contention that the indenture trustee could have, and should have, placed the bondholders in a position to assert claims for interest at the statutory rate is quite dubious. More importantly, however, plaintiff's claims in this action are precluded in the res judicata effect of Order No. 4003 in the Penn Central reorganization proceeding, approving the settlement agreement. The settlement agreement approved by this court provided that non-tendered bonds would be satisfied "as provided in the First Mortgage" from proceeds of the Valuation Case. There can be no doubt whatever as to what the First Mortgage provided on that score. In the event of default, the bondholders were entitled to payment of

> ". . . the whole amount then owing or accrued and unpaid upon Bond for principal and interest; with interest on the overdue principal and on the overdue installments of interest at the same rates respectively borne by the bonds. . . ." (§ 13 of Article Seven.)

Similar provisions are scattered throughout the pertinent portions of the indenture; see Article Seven, § 1, § 2, and § 15.

Plaintiff, whose attorney is his brother, was notified of the hearing on the proposed settlement agreement, and should have registered his objections, if any, at the time. Penn Central, in carrying out the tender offer, and the tendering bondholders as well, plainly did, and were entitled to, rely upon the approved settlement agreement in making the relevant decisions.

The record makes clear that plaintiff was in fairly frequent contact with the indenture trustee and its counsel, and was kept fully informed of developments. He was invited to, but did not, attend a 1977 meeting of bondholders to discuss possible need for "concerted action". At no time until after approval of the settlement agreement and the implementation of the tender offer, did plaintiff ever complain of the conduct of the indenture trustee or lodge any objection with

this court.

It is true that some of the delay experienced by plaintiff in obtaining payment for his bonds was occasioned by the Regional Rail Reorganization Act of 1973 and the ensuing Valuation Case; and that Congress sought to compensate for that delay by providing for interest on the April 1976 valuations, at the rate of 8%, from and after the date of conveyance. By that device, New York Connecting was assured that the assets available as of April 1, 1976 to pay off its bonds would remain available, without further erosion. But that, of course, has no legal effect on the amounts due the bondholders -- a matter governed by the terms of the First Mortgage.

While it might be possible to fashion an equitable argument to the effect that the claims of the bondholders should likewise be insulated from further erosion caused by the passage of time after April 1, 1976, I am not free to do so in the present case. When the 1979 settlement agreement was negotiated, and

when it was presented and approved by this court, all concerned were fully aware of the 8% interest rate on the Valuation Case proceeds. Under the terms of the settlement agreement, each bondholder was given the option of accepting Penn Central's tender offer -- in which case the cash and securities tendered in payment included some additional interest (after the consummation date of the Penn Central Reorganization Plan) -- or of rejecting the tender offer and receiving the payment of principal and interest called for in the First Mortgage. If some other alternative were deemed more equitable, that objection should have been raised at the time. After approval of the settlement agreement, and reliance thereon by so many parties, it would plainly be inappropriate to attempt to restructure the transaction.

Plaintiff has received all that is due him under the clear terms of the First Mortgage. His theory that the New York judgment should have enhanced his prospects, and that a claim for additional interest would have been

recognized in the pertinent bankruptcy proceedings, is not very persuasive, and, in any event, is no longer cognizable. The defendants' motion for summary judgment will therefore be granted.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT W. HUISKAMP,	:	CIVIL ACTION
v.	:	
NEW YORK CONNECTING RAILROAD COMPANY and HORIZON TRUST COMPANY	:	NO. 85-1718

ORDER

AND NOW, this 3rd day of March, 1986, it is ORDERED:

1. Deendants' (sic) Motion for Summary Judgment is GRANTED.

2. This action is DISMISSED.

/s/ John T. Fullam

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-1176

ROBERT W. HUISKAMP

v.

NEW YORK CONNECTING RAILROAD COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 85-1718)
District Judge: Hon. John P. Fullam

Argued
October 14, 1986
Before: GIBBONS and BECKER, Circuit Judges
and BROWN, District Judge*

(Opinion Filed: November 10, 1986)

MEMORANDUM OPINION OF THE COURT

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*Hon. Garrett E. Brown, Jr., United States District Judge for the District of New Jersey, sittin- 'y designation.

GIBBONS, Circuit Judge:

Robert W. Huiskamp, a holder of bonds issued by New York Connecting Railroad Company, of which Horizon Trust Company is the indenture trustee, appeals from a summary judgment in favor of New York Connecting Railroad Company and the indenture trustee, in his suit for additional interest. Huiskamp has been paid the principal and interest to the date of default in full, and interest on the amount due as of the date of default at 2-7/8%, which is the rate specified in the indenture. He contends that because the indenture trustee reduced the bondholders' claims to a judgment on June 29, 1976, he is entitled to interest at the New York legal rate from that date forward.

Huiskamp also contends that if the judgment does not entitle him to the higher rate of default interest, the trustee is liable to him for breach of fiduciary duty in not obtaining the higher rate or for settling the bond holder's claim for the lower rate. We

affirm the district court's rejection of Huiskamp's claims. We endorse the reasoning set forth in Judge Fullam's opinion. We write because there were certain points not addressed in terms therein, and because appellant has argued somewhat differently on appeal than he did in the district court. It is undisputed that because of the pendency of the Penn Central reorganization proceedings, the Trustee and NYCRR agreed that the 1976 judgment would not be enforced by an execution. On June 19, 1979, the trustees in reorganization and the indenture trustee entered into a settlement agreement with respect to claims of New York Connecting Railroad bondholders. That agreement provided that Penn Central would make a tender offer for those bonds. It provided further:

> 8. Treatment of Bonds Not Acquired by Penn Central. In the event that Penn Central acquires some but not all of the New York Connecting bonds pursuant to the tender offer, the amounts which may be due holders of New York Connecting bonds that are not so

> acquired shall be satisfied, as provided in the First Mortgage and subject to the provisions of this Agreement, out of the proceeds of the recovery of New York Connecting in the valuation case and any other assets of New York Connecting available for that purpose.

The settlement agreement was submitted to and approved by the reorganization court in Order No. 4008. No appeal was taken from that order. It is clear that Huiskamp has been paid "as provided in the First Mortgage" out of the recovery of New York Connecting in the valuation case. Although Huiskamp contends that he is entitled to 8% because the higher rate attached immediately upon entry of judgment and replaced the contract rate, the fact is that Huiskamp is bound by the bond trustees' contemporaneous agreement that the higher rate did not apply.

The district court held that Order No. 4008 is a final judgment binding on Huiskamp, and that his claim is barred by res judicata. We agree that there was identity of claims,

identity of parties, an opportunity to be heard, and a final judgment. Thus we agree that Order No. 4008 binds Huiskamp.

Huiskamp contends that even if Order No. 4008 adjudicated his claim against New York Connecting Railroad Company it did not dispose of his separate claims against the indenture trustee for breach of his separate claims against the indenture trustee for breach of its fiduciary duty in failing to press the claim for interest at the legal rate. We hold that the indenture trustee was entitled to summary judgment on that claim because the undisputed facts shown that no such breach occurred. It is clear that in agreeing to payment of interest at the contract rate in accordance with the terms of the indenture, the trustee acted reasonably; although the bond trustee originally claimed the legal rate, the claim was resisted and the compromise was appropriate -- not only because it was doubtful whether he could have prevailed given the terms of the indenture, but also because the

reorganization had potentially threatened the ability of New York Connecting to pay the bond holders. Huiskamp had ample opportunity to raise his point with the bond trustee and with the court but, despite his counsel's inquiries, to all of which the trustee responded, he took no action and it is now too late in the date for him to object.[1] The compromise reflected in order No. 4008 was a reasonable exercise of the indenture trustee's judgment. We find no merit in Huiskamp's argument that the indenture trustee acted in violation of Article 7, Section 15. The bondholders were paid in accordance with the terms of the indenture.

The judgment appealed from will therefore be affirmed.

TO THE CLERK OF THE COURT:

Kindly file the foregoing Memorandum

Opinion.

/s/
Circuit Judge

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1. At oral argument Huiskamp raised a rather interesting claim that, after judgment, the bond trustee became a mere collection agent who had no fiduciary duty. We decline to address any possible merit to this contention since it was not raised in the district court.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 86-1176

ROBERT W. HUISKAMP

v.

NEW YORK CONNECTING RAILROAD COMPANY

(D.C. Civil No. 85-1718)

Before: GIBBONS and BECKER, Circuit Judges, and BROWN, District Judge*

Upon the consideration of the petition for rehearing by appellant before the original panel,

It is O R D E R E D that the petition for rehearing before the original panel is denied.

By the Court,

Dated: December 9, 1986

/s/_____
Circuit Judge

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*Hon. Garrett E. Brown Jr., United States District Judge for the District of New Jersey, sitting by designation.

PROOF OF SERVICE

I am a resident of the County of San Diego, over the age of eighteen years, and not a party to the within action or proceeding. My business address is 101 West Broadway, Suite 400, San Diego, California 92101. I deposited in the United States Mail, postage prepaid, Express Mail, the Petitioner's Petition for Writ of Certiorari on the 10 day of April, 1987:

The Supreme Court of the
United States — Original plus
Office of the Clerk — 40 Copies
Washington, D.C. 20543

Matthew J. Siembieda, Esquire — 3 copies
1200 Four Penn Center Plaza
Philadelphia, Pennsylvania 19103

Robert J. Siverd — 3 Copies
2920 IVB Building
1700 Market Street
Philadelphia, Pennsylvania 19103

I declare under penalty of perjury that the foregoing is true and correct and that this Proof of Service was executed on April 10, 1987.

Elaine Bailey